



0000071328

XONLOGUE

N

27  
2/4/97BISBEE, ARIZONA 85603-0087  
TELEPHONE (520) 432-2279RECEIVED  
AZ CORP COMMISSION

JAN 15 3 21 PM '97

DOCUMENT CONTROL

1 Attorney For Sulphur Springs Valley Electric Cooperative, Inc.

2 CHRISTOPHER HITCHCOCK  
3 STATE BAR NO. 004523

4 BEFORE THE ARIZONA CORPORATION COMMISSION

DOCKETED

5 CARL KUNASEK  
Chairman  
6 JAMES M. IRVIN  
Commissioner  
7 RENZ D. JENNINGS  
Commissioner

JAN 15 1997

DOCKETED BY

8 IN THE MATTER OF IN THE COMPETITION ) DOCKET NO. U-0000-94-165  
9 IN THE PROVISION OF ELECTRIC )  
10 SERVICES THROUGHOUT THE STATE ) APPLICATION FOR  
OF ARIZONA ) REHEARING AND  
11 ) REQUEST FOR STAY  
12 )13 SULPHUR SPRINGS VALLEY ELECTRIC COOPERATIVE, INC.,  
14 ("SSVEC"), pursuant to A.R.S. § 40-253, submits this Application  
15 for Rehearing and Request for Stay of Decision No. 59943 dated  
16 December 26, 1996. Rehearing and a stay pending Commission  
17 determination of the issues raised is requested as to all aspects  
18 of Decision No. 59943 and its appendices including the Rules set  
19 forth in its Appendix A (collectively, the "Decision").20 I. INTRODUCTION21 Sulphur Springs Valley Electric Cooperative, Inc. (SSVEC)  
22 urges this Commission to step back and take a deep breath prior to  
23 plunging into these unknown waters. However inviting they may  
24 appear on the surface, there are significant obstacles and dangers  
25 to all involved. Our member consumers, our owners, are more likely  
26 to feel the brunt of the ill effects of competition as their

1 electricity needs are not the most competitively attractive and  
2 will feel the effect of the loss a single large customer  
3 considerably more than their urban counterparts. As noted by the  
4 Electric Consumers' Alliance, ("ECA") promises of huge savings from  
5 retail wheeling are inaccurate and misleading. Representing more  
6 than 150 organizations speaking for consumer groups, the elderly,  
7 the disabled and small business, the ECA concluded that the  
8 country's largest manufacturers would benefit the most from open  
9 access and the interests of small consumers are most in jeopardy.  
10 Additionally, APS has submitted testimony estimating hundreds of  
11 millions of dollars of tax consequences for the state, its schools  
12 and localities as a result of the Rules.

13 Moreover, in the Interim Report of the Electric System  
14 Reliability and Safety Working Group, submitted December 31, 1996,  
15 thirty-one (31) key areas were identified concerning system  
16 planning, system operation and administration which will be changed  
17 by the implementation of retail competition. These areas concern  
18 basic questions as to who is responsible for providing reliability  
19 related services. These questions, must be answered before leaping  
20 into the unknown. The electric system's reliability must not be  
21 compromised.

22 If this Commission fails to act to alter this course, it  
23 will materially retard, not advance, the common goal of moving to  
24 a competitive system of electric supply which can safely, reliably  
25 and economically serve the power needs of 21st Century Arizona.

1 Instead of focusing our collective resource cooperatively on this  
2 goal, needless time and effort will be expended in the court system  
3 to demonstrate the obvious - that the Commission must consult with  
4 and be empowered by both the Legislature and the people prior to  
5 altering the state's constitutional and public utility policy.  
6 Once that judgment has been rendered, the entire effort must begin  
7 again thus delaying the introduction of rational retail access.

8 SSVEC and its sister cooperatives have a unique role in  
9 and view of this issue. On the one hand, we only exist to assure  
10 a safe, reliable and economical supply of electricity for or rural  
11 owners. Our customer and our stockholder are one and the same. An  
12 electric bill savings is a dividend for our member owners. On the  
13 other hand, we are mindful of the fact that previous competitive  
14 transitions in airlines and telecommunications have in the main  
15 left the rural consumer with higher cost and lower quality service  
16 - a fear recognized by the Commission in its Telecommunications'  
17 Universal Service Fund. Even worse, these Rules threaten the very  
18 structure which has allowed cooperatives to energize rural Arizona  
19 over the past sixty years. They must be allowed to continue to  
20 fulfill that mission, which others did not meet, in the future.

21 There are numerous prudent reasons to wait and do this  
22 right. Let's work together to clear out the unknown and assure all  
23 consumers the best possible route for this journey.

## 24 II. THE DECISION AND RULES ARE FLAWED

25 The Decision is unconstitutional, unlawful, unreasonable,  
26

in excess of the Commission's jurisdiction, arbitrary, capricious and an abuse of the Commission's discretion upon the grounds and for the reasons set forth in the following documents, each of which are incorporated herein by this reference as if fully set forth herein:

1. ARIZONA ELECTRIC POWER COOPERATIVE, INC., (AEPCO'S) letter of April 18, 1995 to Commission Attorney Janice Alward from Patricia Cooper. A copy is attached and incorporated herein.

2. The Comments of AEPCO dated June 28, 1996.

3. The Comments of Trico Electric Cooperative, Inc. ("Trico") dated September 11, 1996.

4. The Comments of Arizona's Electric Cooperatives on the Draft Rules dated September 12, 1996.

5. The Comments of the Rural Utilities Service, an agency of the United States Department of Agriculture, dated September 12, 1996.

6. The Comments of the National Rural Electric Cooperative Association dated September 11, 1996.

7. The Comments of the National Rural Utilities Cooperative Finance Corporation filed September 11, 1996.

8. The SSVEC, AEPCO, Graham and Duncan Comments on Proposed Rules dated November 8, 1996.

9. The Comments of Trico dated November 8, 1996.

10. The Comments of Arizona Public Service Company ("APS") on Proposed Retail Electric Access Rules dated

November 8, 1996.

11. The testimony of Messrs. Pollack, Barker, Landon and Hieronymus which were attached to the APS' Supplemental and Reply Comments dated November 27, 1996.

12. Section IV concerning legal issues, pages 22 to 34, of the First Set of Comments on Proposed Rule Regarding Retail Electric Competition on behalf of Tucson Electric Power Company dated November 8, 1996.

13. The Supplemental Comments of SSVEC, AEPCO, Duncan and Graham dated November 25, 1996.

14. The Exceptions of APS to Staff's Proposed Order dated December 20, 1996.

15. The Application for Rehearing and Request for Stay of Trico dated January 13, 1997.

In amplification of, and not by way of limitation of the foregoing, the Decision is unconstitutional, unlawful, unreasonable, in excess of the Commission's jurisdiction, arbitrary, capricious and an abuse of the Commission's discretion for the reasons and upon the grounds set forth below:

A. The Decision violates Arizona statutes including, but not limited to, A.R.S. § 40-281 and case law decided thereunder by changing the public policy of this state from one of regulated monopoly concerning the supply of electric service.

1 B. The Decision violates Arizona's Constitution  
2 including, but not limited to, its Article XV, Section 6,  
3 by attempting to exercise powers expressly and impliedly  
4 reserved to the Legislature and the Courts.

5 C. The Decision violates Article XV of Arizona's  
6 Constitution in purporting to prescribe and establish  
7 rates and charges for electric services on a basis other  
8 than the constitutionally mandated system of a just and  
9 reasonable rate of return on the fair value of the  
10 property of public service corporations.

11 D. The Decision violates the just compensation  
12 provisions of the Fifth Amendment to the United States  
13 Constitution and Article II, Section 17 of the Arizona  
14 Constitution ("just compensation provisions"), and the  
15 due process provisions of the Fourteenth Amendment to the  
16 United States Constitution and Article II, Section 4 of  
17 the Arizona Constitution ("due process provisions"), by  
18 breaching the regulatory compact between the State of  
19 Arizona and its electric public service corporations,  
20 including SSVEC, to whom the Commission has issued  
21 Certificates of Convenience and Necessity.

22 E. The Decision violates the due process provisions  
23 of the United States and Arizona Constitutions and the  
24 requirements of A.R.S. § 40-252 by failing to provide  
25 SSVEC with notice and an opportunity to be heard prior to  
26

the amendment of its Certificate of Convenience and Necessity.

F. The Decision violates the just compensation provisions of the United States and Arizona Constitutions by depriving SSVEC and its member-owners of their vested property rights.

G. The Decision violates the just compensation provisions of the United States and Arizona Constitutions by confiscating SSVEC's and its member-owners' property for a public purpose and use.

H. The Decision violates the just compensation and other provisions of the United States and Arizona Constitutions by purporting to limit amounts to be paid to SSVEC and its member-owners for deprivation of their property rights and by assuming to the Commission, not the Courts, the power of determining such compensation.

I. The Decision violates the supremacy clause of Article VI of the United States Constitution and frustrates federal law including, but not limited to the Rural Electrification Act of 1936, as amended, by, inter alia, causing defaults on federal loans and/or federally guaranteed mortgages on which SSVEC is an obligor, impairing the contractual relationships between SSVEC and its member-owners and impairing the all requirements wholesale power contracts relationship between and among

1 AEPCO and its Class A member distribution cooperatives,  
2 which includes SSVEC (Class A Members).

3 J. The Decision violates Article I, Section 10, CL.  
4 1 of the United States Constitution, and Article II,  
5 Section 25 of the Arizona Constitution, in that it  
6 impairs the obligations of contracts between SSVEC and  
7 its member-owners and the obligations of contracts  
8 between and among AEPCO and its Class A members including  
9 SSVEC.

10 K. The Decision violates the equal protection  
11 provisions of the 14th Amendment to the United States  
12 Constitution and Article II, Section 13 of the Arizona  
13 Constitution in that it does not provide equal treatment  
14 of all electric utilities and electric service providers  
15 in the State of Arizona.

16 L. The Decision exceeds the Commission's statutory  
17 authority to order joint use of facilities by others of  
18 property owned and operated by SSVEC.

19 M. The Decision is impermissibly vague.

20 N. The Decision impermissibly interferes with the  
21 internal management and operations of SSVEC and its  
22 owners-members.

23 O. The Decision exceeds the jurisdiction, power and  
24 authority granted to the Commission in the Arizona  
25 Constitution and the statutes of Arizona and assumes  
26



1 powers to the Commission not granted by the Constitution  
2 and statutes of the State of Arizona.

3 P. The Decision violates the requirements of the  
4 Administrative Procedure Act, Title 41 Chapter 6, of the  
5 Arizona Revised Statutes including but not limited to the  
6 provisions of A.R.S. §§ 41-1025, 41-1044 and 41-1057.

7 III. CONCLUSION

8 WHEREFORE, having fully stated its Application for  
9 Rehearing, SSVEC respectfully requests that the Commission enter  
10 its Order granting the Application for Rehearing and staying the  
11 Decision and the Rules adopted pending resolution of the issues set  
12 forth herein.

13 RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of January, 1997.

14 HITCHCOCK, HICKS & CONLOGUE

15  
16 BY 

17 CHRISTOPHER HITCHCOCK  
18 Attorneys for SULPHUR  
19 SPRINGS VALLEY ELECTRIC  
20 COOPERATIVE, INC.  
21  
22  
23  
24  
25  
26

I hereby certify that I have this day served an **ORIGINAL**  
**AND TEN (10) COPIES** of the foregoing Application for Rehearing and  
Request for Stay on this 15<sup>th</sup> day of January, 1997, to:

Docket Control  
Arizona Corporation Commission  
1200 West Washington  
Phoenix, Arizona 85007

**COPY** of the foregoing mailed this 15<sup>th</sup> day of January, 1997, to:

Director  
Utilities Division  
Arizona Corporation Commission  
1200 West Washington  
Phoenix, Arizona 85007

Mr. Stephen Ahearn  
Arizona Dept. of Commerce Energy Office  
3800 N Central, 12th Fl.  
Phoenix, AZ 85012

Mr. Rick Gilliam  
Land & Water Fund of the Rockies  
2260 Baseline Road, Suite 200  
Boulder, CO 80302

Ms. Betty Pruitt  
Arizona Community Action Association  
67 E Weldon, Suite 310  
Phoenix, AZ 85012

Michael Curtis, Esq.  
Arizona Municipal Power Users Association  
2712 North Seventh St.  
Phoenix, AZ 85006-1003

Mr. Bill Meek  
Arizona Utility Investors Association  
3030 N Central, Suite 506  
P.O. Box 34805  
Phoenix, AZ 85067

Mr. Choi Lee  
Phelps Dodge Corp.  
2600 N. Central Avenue  
Phoenix, AZ 85004-3014

**HITCHCOCK, HICKS & CONLOGUE**

ATTORNEYS AT LAW

POST OFFICE BOX 87

COPPER QUEEN PLAZA

BISBEE, ARIZONA 85603-0087

TELEPHONE (520) 432-2279

1 Bradley Carroll, Esq.  
Tucson Electric Power Co.  
222 West Sixth Street  
2 P.O. Box 711  
Tucson, AZ 85702

3  
4 Ms. Barbara A. Klemstine  
Vicki G. Sandler, Esq.  
Arizona Public Service  
5 P.O. Box 53999  
Phoenix, AZ 85072-3999

6  
7 Mr. Creden Huber  
General Manager  
Sulphur Springs Valley Electric Cooperative Inc.  
8 P.O. Box 820  
Willcox, AZ 85644

9  
10 Mr. Mike McElrath  
Manager, Power  
Cyprus Climax Metals Co.  
11 P.O. Box 22015  
Tempe, AZ 85285-2015

12  
13 Mr. Wallace Kolberg  
Ms. Debra S. Jacobson  
Southwest Gas Corporation  
14 P.O. Box 98510  
Las Vegas, NV 89193-8510

15  
16 Mr. A.B. Baardson  
Nordic Power  
4281 N Summerset  
17 Tucson, AZ 85715

18 Mr. Michael Rowley  
% Calpine Power Services  
19 50 West San Fernando, Suite 550  
San Jose, CA 95113

20  
21 Mr. Dan Neidlinger  
3020 N 17th Dr.  
Phoenix, AZ 85015

22  
23 Jessica Youle, Esq.  
Salt River Project Agricultural  
Improvement and Power District  
24 PAB300 - P.O. Box 52025  
Phoenix, AZ 85072-2025

25  
26

**HITCHCOCK, HICKS & CONLOGUE**

ATTORNEYS AT LAW

POST OFFICE BOX 87

COPPER QUEEN PLAZA

BISBEE, ARIZONA 85603-0087

TELEPHONE (520) 432-2279

- 1 Patricia Cooper, Esq.  
Arizona Electric Power Cooperative  
P.O. Box 670
- 2 Benson, AZ 85602-0670
- 3 Mr. Clifford Cauthen  
General Manager
- 4 Graham County Electric Cooperative  
P.O. Drawer B
- 5 9 West Center  
Pima, AZ 85543
- 6
- 7 Mr. Greg Patterson  
Residential Utility Consumer Office  
2828 N Central Ave., Suite 1200
- 8 Phoenix, AZ 85004
- 9 Mr. Marv Athey  
Trico Electric Cooperative  
P.O. Box 35970
- 10 Tucson, AZ 85740
- 11
- 12 Mr. Joe Eichelberger  
Magma Copper Co.  
P.O. Box 37
- 13 Superior, AZ 85273
- 14 Mr. Wayne Retzlaff  
Navopache Electric Cooperative, Inc.  
P.O. Box 308
- 15 Lakeside, AZ 85929
- 16
- 17 Beth Ann Burns, Esq.  
Citizens Utilities Company  
2901 N Central Ave.  
Suite 1660
- 18 Phoenix, AZ 85012
- 19
- 20 Mr. Steve Kean  
ENRON  
P.O. Box 1188
- 21 Houston, TX 77251-1188
- 22 Mr. Jack Shilling  
Duncan Valley Electric Cooperative  
P.O. Box 440
- 23 Duncan, AZ 85534
- 24
- 25
- 26

**HITCHCOCK, HICKS & CONLOGUE**

ATTORNEYS AT LAW

POST OFFICE BOX 87

COPPER QUEEN PLAZA

BISBEE, ARIZONA 85603-0087

TELEPHONE (520) 432-2279

- 1 Ms. Nancy Russell  
Arizona Association of Industries  
2025 N 3rd Street
- 2 Suite 175  
Phoenix, AZ 85004
- 3
- 4 Mr. Barry Huddleston  
Destec Energy  
P.O. Box 4411
- 5 Houston, TX 77210-4411
- 6
- 7 Mr. Steve Montgomery  
Johnson Controls  
2032 W 4th Street
- 8 Tempe, AZ 85281
- 9
- 10 Mr. Terry Ross  
Center for Energy and Economic Development  
7853 E Arapahoe Court, Suite 2600  
Englewood, CO 80112
- 11
- 12 Mr. George Allen  
Arizona Retailers Association  
137 University
- 13 Mesa, AZ 85201
- 14
- 15 Mr. Ken Saline  
K.R. Saline & Associates  
P.O. Box 30279  
Mesa, AZ 85275
- 16
- 17 Louis A. Stahl, Esq.  
Streich Lang  
2 North Central Ave.  
Phoenix, AZ 85004
- 18
- 19 Mr. Douglas Mitchell  
San Diego Gas & Electric Company  
P.O. Box 1831
- 20 San Diego, CA 92112
- 21
- 22 Ms. Sheryl Johnson  
Texas-New Mexico Power Company  
4100 International Plaza  
Ft. Worth, TX 76109
- 23
- 24
- 25
- 26

- 1 Mr. Stephen McArthur  
Mohave Electric Cooperative  
P.O. Box 1045
- 2 Bullhead City, AZ 86430
- 3 Mr. Carl Albrecht  
General Manager
- 4 Garkane Power Association, Inc.  
P.O. Box 790
- 5 Richfield, Utah 84701
- 6 Ms. Karen Glennon  
19037 N 44th Ave.
- 7 Glendale, AZ 85308
- 8 Ajo Improvement Company  
P.O. Drawer 9
- 9 Ajo, AZ 85321
- 10 General Manager  
Columbus Electric Cooperative
- 11 P.O. Box 631  
Deming, NM 88031
- 12 Mr. Dick Shipley  
Continental Divide Electric Cooperative
- 13 P.O. Box 1087  
Grants, NM 87020
- 14 General Manager  
Dixie-Escalante Electric Cooperative
- 15 CR Box 95  
Beryl, Utah 84714
- 16 General Manager  
Morenci Water and Electric Company
- 17 P.O. Box 68  
Morenci, Arizona 85540
- 18 Mr. Charles Huggins  
Arizona State AFL-CIO
- 19 110 N 5th Ave.  
P.O. Box 13488
- 20 Phoenix, AZ 85002
- 21 Ms. Ellen Corkhill  
AARP
- 22 5606 N 17th St.  
Phoenix, AZ 85016
- 23
- 24
- 25
- 26

- 1 Ms. Phyllis Rowe  
Arizona Consumers Council  
6841 N 15th Place
- 2 Phoenix, AZ 85014
- 3 Mr. Andrew Gregorich  
BHP Cooper
- 4 P.O. Box M  
San Manuel, AZ 85631
- 5 Mr. Larry McGraw  
USDA-RUS  
6266 Weeping Willow
- 6 Rio Rancho, NM 87124
- 7 Mr. Jim Driscoll  
Arizona Citizen Action  
2430 South Mill
- 8 Suite 237  
Tempe, AZ 85282
- 9 Mr. William Baker  
Electrical District No. 6  
P.O. Box 16450
- 10 Phoenix, AZ 85011
- 11 Mr. John Jay List  
General Counsel  
National Rural Utilities  
Cooperative Finance Corp.
- 12 2201 Cooperative Way  
Herndon, VA 21071
- 13 Wallace Tillman, Esq.  
Chief Counsel  
National Rural Electric  
Cooperative Association
- 14 4301 Wilson Blvd.  
Arlington, VA 22203-1860
- 15 David C. Kennedy, Esq.  
Law Offices of David C. Kennedy  
100 W Clarendon Ave. Suite 200
- 16 Phoenix, AZ 85012
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26

HITCHCOCK, HICKS & CONLOGUE

ATTORNEYS AT LAW

POST OFFICE BOX 87

COPPER QUEEN PLAZA

BISBEE, ARIZONA 85603-0087

TELEPHONE (520) 432-2279

- 1 Mr. Norman J. Furuta  
2 Department of the Navy  
3 900 Commodore Dr., Building 107  
4 P.O.Bx 272 (Attn Code 90C)  
5 San Bruno, Ca 94066
- 6 Thomas C. Horne, Esq.  
7 Michael S. Dulberg  
8 Horne, Kaplan & Bistrow  
9 40 N Central Ave.  
10 Suite 2800  
11 Phoenix, AZ 85004
- 12 Ms. Barbara S. Bush  
13 Coalition for Responsible Energy Education  
14 315 W Riviera Dr.  
15 Tempe, AZ 85282
- 16 Mr. Sam Defrawi  
17 Department of the Navy  
18 Naval Facilities Engineering Command  
19 Navy Rate Intervention  
20 901 M St SE, Bldg. 212  
21 Washington, DC 20374
- 22 Mr. Rick Lavis  
23 Arizona Cotton Growers Association  
24 4139 E Broadway Rd.  
25 Phoenix, AZ 85040
- 26 Mr. Steve Brittle  
Don't Waste Arizona, Inc.  
6205 South 12th St.  
Phoenix, AZ 85040
- Mr. Robert Julian  
PPG  
1500 Merrell Lane  
Belgrade, Montana 59714
- Mr. James Tarpey  
Enron Capital & Trade Resources  
One Tabor Center  
1200 17th St., Suite 2750  
Denver, CO 80202

24 BY *Virginia E Hathaway*  
25 Secretary to Christopher Hitchcock  
26





## Arizona Electric Power Cooperative, Inc.

P.O. Box 670 • Benson, Arizona 85602-0670 • Phone 520-586-3631

April 18, 1995

Janice Alward, Esq.  
Staff Attorney  
Arizona Corporation Commission  
1200 West Washington  
Phoenix, Arizona 85007

Re: Submission of Legal Issues  
ACC Retail Electric Competition  
Docket No. U-0000-94-165

Dear Ms. Alward:

In accordance with the "call for issues" discussion at the Attorney Task Force meeting held March 29, I offer the following legal issues of principal concern to AEPCO. As a rural electric cooperative, we believe these issues should be considered and resolved as part of any Commission process regarding competition and retail access in the electric utility industry in Arizona. I realize some issues may be cumulative to those raised by others on the subcommittee. However, I believe their inclusion by a number of us should heighten, rather than diminish, their importance in the Commission's decision-making process.

### LEGAL ISSUES

#### Arizona Constitutional Issues:

1. May the ACC order or allow retail competition and not set rates, charges and classifications (e.g., through individually negotiated contracts) despite the language of Const. Art. 15, §2 and §3, which provide, in pertinent part, that the ACC "shall" prescribe just and reasonable classifications to be used and just and reasonable rates and charges to be made and collected . . . ."
2. Should IPP's, NUG's, and other corporations "engaged in furnishing electricity for light, fuel or power" be regulated by the ACC in that business as "public service corporations" pursuant to Const. Art. 15, §2 with their rates and charges, methods of operation, services, and facilities subject to such regulation, since the Commission's Constitutional power to regulate such corporations derives from a corporation's status as a public service corporation and not from any status as a regulated monopoly or as a holder of

COPY

a CC&N.

3. Since Const. Art. 15, §3 grants the ACC exclusive and plenary jurisdiction to regulate all public service utilities within the state, "in the transaction of business within the state," does the Arizona Constitution require the ACC to regulate "retail sales" to the public within Arizona by public service corporations outside Arizona's boundaries?
4. May the ACC, through a "legislative" order (by rule-making) decide the issues of retail competition or retail wheeling, or is the ACC required by constitutional considerations of due process to decide such issues only through a full adjudicative process, giving each affected public service corporation notice and an opportunity to be heard, since any orders on this issue may require a public service corporation to alter its financing, its property, or its corporate policies in a significant manner?
5. Case law holds that the ACC is under a duty to protect a public service corporation in its exclusive right to serve electricity in the area where it renders service under its certificate. Further, the ACC is under a duty to prohibit other utilities under its jurisdiction from competing in such arena unless, after notice and opportunity to be heard, the Commission finds that the public service corporation failed or refused to render satisfactory and adequate service at reasonable rates. Therefore, once the ACC has issued a CC&N, may it rescind, alter, or amend it by ordering retail competition?
6. If compensation should be paid for the "taking" of a CC&N as a vested right, what is the proper measure of compensation: the utility's profits, its margins, its earnings, the expenses covered by the load lost; the resulting rate increases to members or ratepayers from the loss of the monopoly load?
7. Since the power of the ACC lies in whether a utility is a public service corporation, and not whether the public service corporation is subject to a CC&N, and the Arizona Constitution prohibits discrimination by a public service corporation in charges, services, and facilities, does the ACC have the authority to order retail wheeling with the discrimination that is inherent to retail competition?

Electric Cooperative Issues:

1. Will the Rural Utilities Service (RUS), successor in interest to the REA, as a creditor agency and regulator, preempt ACC-ordered retail wheeling which adversely affects RUS borrowers in order to protect its rights as a mortgage holder?
2. Will the RUS preempt ACC-ordered retail wheeling because the state action would

COPY

frustrate the federal purpose of the Rural Electrification Act (RE Act) to provide reliable and economically priced electric service to as much of rural America as economically feasible? Note that a purpose of the RE Act was also to end abuses by private utility companies, particularly the cream skimming of customers that had prevented the full electrification of rural America, and to maximize rural electrification by using more profitable areas and customers to leverage less profitable ones to "avoid the stranding of considerable areas which cannot be self sustaining....."

3. Cooperatives cannot dispose of property without RUS approval; nor can non-RE Act beneficiaries use the property of Act beneficiaries. 7 USC §907 would prohibit the disposal of franchises, property or rights that are assets, including exclusive service territories.
4. Most cooperatives are IRC Section 501(c)(12) tax exempt entities because their member income is at least 85% of total income. Revenues from non-members likely would increase with ACC-ordered retail wheeling. Will this cause cooperatives to lose their tax exempt status as a non-profit corporation in order to follow ACC orders? Will Arizona's cooperative enabling legislation provide that a transmission-only customer can be a member? Will the IRS accept this rather loose member policy or find it a sham?
5. The All Requirements Contracts inherent to G&T and Distribution cooperatives establish a unique set of legal rights and obligations since they secure RUS loans and effectuate RUS policy to provide the economic means to supply electricity to rural areas; they provide a revenue stream corresponding with the G&T's repayment of its debt obligation and these contracts cannot be avoided nor abrogated by state action.
6. Electric cooperative systems built with RUS funds can only be used to serve RE Act beneficiaries. Can RE Act funded existing systems serve non-member loads? ACC imposed retail wheeling may put the cooperatives in the position of being unable to obtain RUS financing for system additions needed for retail wheeling if the wheeling is considered non-Act beneficiary load. Additionally, will the RUS finance system additions to serve load that is retail load a member has obtained from another supplier?
7. What happens with a customer who leaves and then returns, if the ACC requires utilities to serve customers who have departed but wish to reconnect. Would that customer be an Act beneficiary?
8. Will the RUS consider retail loads "won" by a cooperative away from another supplier to be Act beneficiary load?
9. Pricing considerations in any retail wheeling program need to address the unique

COPY

characteristics of the G&T/distribution cooperative structure as to pricing (This may, in all likelihood, also be a FERC matter as to the G&T).

10. If the distribution cooperatives were regulated by the ACC, but the G&T were non-regulated or regulated by FERC, can the ACC create a pricing policy that does not trap costs that cannot be recovered. Note that with no shareholders, the Government and other lenders are left bearing unrecovered costs.
11. Given the capital structure of cooperatives, it is unclear what a fair pricing policy for non-member transmission service would be. Should non-Act beneficiaries get the benefit of assets purchased with low interest government loans? The ACC should take into consideration the current subsidy a cooperative obtains through the RUS for RE Act beneficiary purposes. A non-RE Act beneficiary should not benefit to the detriment of the RUS borrowers. For example, if an RUS borrower is ordered to expand its system, and the rate charged to the non-RE Act beneficiary is based on the RUS borrower's embedded cost of debt, the non RE Act beneficiary would get the benefit of the loan subsidies through the borrower's weighted average cost of debt in the computation of rates and the RE-Act beneficiary costs would increase. Additionally, should there be an assumed return on equity in pricing that emulates what shareholders would receive that would go to enhance member equity?
12. How will stranded generation costs be handled? If the solution is based on an assumption of integrated electric systems, is there a possibility of inconsistent state/federal regulatory schemes that trap costs for non-integrated cooperative systems?
13. RUS must approve any transmission service agreement entered into by a G&T or distribution cooperative. May and will RUS use that approval to preempt ACC regulatory action mandating retail wheeling? Must and will it do so on a case-specific base, as it has with annexation, rather than generically?
14. RUS must approve a cooperative's rates for transmission service and for power sales. Exit fees, generic adders, and other devices to recover or not recover full stranded costs are thus subject to RUS review. May and will RUS use its review power to preempt ACC action? Will RUS develop a general guideline as to the rate structures it finds adequate to protect RUS security? Alternatively, will RUS merely review rates on a case-by-case basis as it now does power sales?
15. Will RUS urge FERC to take over all pricing for wheeling, deciding that it would be far better off having FERC determine pricing to the extent possible, rather than having to track numerous state proceedings?
16. Is retail competition inherently discriminatory to the isolated rural customers who lack

COPY

sufficient density to benefit from any direct access plans and whose transaction costs are too high? Private utility companies' historic records with rural customers led to the formation of rural electric cooperatives -- the original concept of direct access. Note that in every deregulated market (gas, airlines, telephone) costs are higher to the isolated and the inelastic customers.

17. The Cooperative system has a unique structure as a unified system; it is not an integrated utility. A G&T cooperative is owned by the distribution cooperatives to provide them with economically priced power. It would be unable to provide that cost-effective service if the system were dismantled piecemeal.
18. If the ACC were to continue to protect CC&N's for distribution and order retail competition only for generation, does this discriminate against the state's only regulated generation and transmission (G&T) utility, since all other utilities with both generation and distribution would continue to hold their vested rights to a CC&N? Is there any legitimate policy basis for sheltering from the adverse consequences of competitive markets only those who own distribution while denying protection to one equally at risk, but which lacks the structure to own distribution facilities?
19. Stranded investment cost recovery cannot ever resolve the problems which resulted in the service territory concept: duplication of facilities with resulting financial and environmental consequences; cream-skimming where the "best" loads are taken, leaving the poor load factor and less dense areas for the cooperatives; the creation of death spirals, as rates to remaining customers escalate when the most profitable loads are taken; the loss of loads which would place RUS loans at risk, and shift a RUS cooperative's property, its CC&N rights, to the benefit of a private entity for that entity's gain at the expense of the government.

Other Legal Issues:

1. Do we really want to transfer Arizona's regulatory playing field to Washington, D.C.? If the ACC orders retail wheeling, will FERC, in effect, replace the ACC as Arizona's utility regulator since transmission lines, coordination services, regional power pools, and wholesale sales are all interstate commerce, and, by and large, already FERC regulated? If the ACC authorizes retail wheeling; does FERC automatically take over; will there be an inadvertent abdication of ACC regulatory responsibility?
2. The ACC does not regulate municipalities yet if it orders retail wheeling the municipalities could sell their power and wheel it over the regulated utilities' lines to the regulated utilities' former customers. However, the ACC could not require reciprocity by the municipalities. Cities could "cherry pick" or "cream skin" from a regulated utility at will, and keep the municipalities' customers "hands-off" from the regulated

COPY

utilities.

3. Is compulsory non-consensual retail wheeling an unlawful confiscation of a utility's property in violation of the due process and equal protection provisions of the 14th Amendment?
4. If the ACC allows recognition of stranded investment and facilitates the recovery of stranded investment-related charges by any public utility, should it not also require, as a condition precedent to the eligibility for such recovery, a commitment that the public utility and any of its affiliates will compensate any other utility that they subject to stranded investment costs?
5. Where is the dividing line between states and federal jurisdiction over these issues? Can transportation jurisdictions realistically be allocated along retail/wholesale lines?
6. If the ACC decides to forego unregulated retail wheeling, can mechanisms be put in place to prohibit "retail" customers from transforming themselves into "wholesale" customers to avoid paying for the cost of plant and facilities prudently incurred under the utilities' obligation to serve?
7. If retail competition becomes a reality, what happens to future customers' needs? Who will plan for them? In a true competitive market, all will build according to short-term needs and economic standards: no one will build to meet long term needs which might be more expensive; market pressure will control; forget about reliability over the long term; forget about reasonable cost to those left behind. If this is a likely result, is there still a need for the regulatory compact to keep rate payers from becoming unwilling equity partners of the dealers in the new wholesale/retail competitive marketplace?
8. Would compulsory retail wheeling impair the obligations of the public service corporation's franchises, their joint electric coordination agreements, joint economic dispatch, and the interconnection contracts with neighboring utilities and cities which provide emergency power and short-term sales.
9. Can a form of the telephone universal service fund be implemented to mitigate the impact of retail competition to similar "high cost" service areas?

**Solutions Other Than Mandated Retail Wheeling:**

1. Require efficient interchange of energy and capacity among utilities to assure the efficient use of existing utilities.
2. Allow utilities, under the current ACC regulatory system, to freely negotiate contracts

COPY

Janice Alward, Esq.

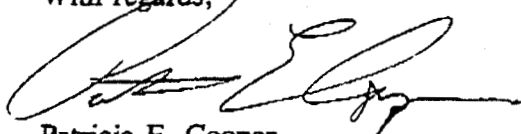
April 18, 1995

Page 7

with their Certificated area customers at rates sufficient to cover utility costs. At the same time, provide tariffs for those customers unwilling or uninterested in negotiating individual contracts with their certificated utility. Hold utilities accountable for contract "losses," while providing flexibility to prevent potential loss of load to unregulated entities, other states' utilities, or municipalities. This is a viable alternative to a state mandated retail wheeling system that retains distribution service areas and tariffs. Such a system can result in regulated utilities being required to charge tariffed rates while other power suppliers can offer the same customers lower, unregulated, retail wheeled rates.

These are the legal issues which come readily to mind. As well, AEPCO concurs with Steven Wheeler that the issues raised by Arizona Public Service must also be considered and resolved. AEPCO looks forward to continued participation in this process.

With regards,



Patricia E. Cooper  
Corporate Counsel

c/D. Kimball  
B. Hewlett  
D. Criswell  
L. Huff  
M. Grant  
C. Hitchcock  
R. Jones

COPY